Filed 7/10/20 In re J.S. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re J.S. et al., Persons Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. B.S., Defendant and Appellant.	E073769 (Super.Ct.Nos. J280305, J280306 & J280307) OPINION

APPEAL from the Superior Court of San Bernardino County. Christopher B. Marshall, Judge. Affirmed.

Paul A. Swiller, under appointment by the Court of Appeal, for Defendant and Appellant.

Michelle D. Blakemore, County Counsel, David Guardado, Deputy County Counsel, for Plaintiff and Respondent.

I

INTRODUCTION

B.S. (Father) and J.G. (Mother)[1] have a history of abusing drugs and domestic violence, resulting in the San Bernardino County Children and Family Services (CFS) removing their children, four-year-old Jo.S. and 10-year-old Ja.S., from their custody.[2] At the combined jurisdictional/dispositional hearing, the juvenile court found the allegations in the petition true and provided Father with reunification services with a goal of returning the children to his care. The juvenile court also found that the Indian Child Welfare Act (ICWA) may apply to Jo.S. and Ja.S.[3] Father appeals from the juvenile court's jurisdictional/dispositional orders finding the allegations true.

Father contends the orders must be reversed due to noncompliance with the inquiry and notice requirements of the Indian Child Welfare Act (ICWA). (Welf. & Inst. Code,[4] § 224 et seq.; 25 U.S.C. § 1901 et seq.) CFS argues the appeal must be dismissed or affirmed for lack of ripeness because Father's appeal is premature as the juvenile court made a finding that ICWA may apply to Ja.S. and Jo.S., and thus further inquiry and

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[1] Mother is not a party to this appeal.

[2] Father's eldest child, 17-year-old D.S., was also removed from his custody. However, D.S. is not a subject to this appeal.

[3] The juvenile court found that ICWA may apply to Ja.S. and Jo.S. due to their mother's claim of Indian heritage through the "Sauxfox tribe." The court found that ICWA did not apply to D.S., who had a different mother.

[4] All future statutory references are to the Welfare and Institutions Code unless otherwise stated.

notice was required and any perceived deficiencies with ICWA notice can be resolved through the course of the dependency proceeding. We agree with CFS that the ICWA issues are premature and affirm the jurisdictional and dispositional orders. However, we remind the juvenile court that it must ensure the court and CFS comply with federal and state ICWA laws.

II

FACTUAL AND PROCEDURAL BACKGROUND

The family came to the attention of CFS on December 8, 2018, after a referral was received alleging Mother was under the influence of a controlled substance and was overdosing. It was also reported that, on that same day, Mother and Father had engaged in a domestic dispute, which resulted in Mother grabbing and biting the leg of Ja.S. Mother eventually left the family residence with Jo.S.

On December 14, 2018, Father called law enforcement indicating that he believed Jo.S. to be in danger in Mother's care and was unsure of their whereabouts. A social worker spoke with Ja.S., D.S., Father, and the paternal grandparents in the home of the paternal grandparents. The children reported ongoing domestic violence in the home perpetrated by Mother against Father, and Mother's use of methamphetamines. Ja.S. confirmed that Mother had bit her on the leg, breaking her skin. The paternal grandparents also reported ongoing domestic violence between Mother and Father. Father confirmed the domestic abuse allegations and stated that he and Mother used

drugs together. Mother and Jo.S. were eventually located. Mother reported that she was fearful of Father and that Father was a regular methamphetamine user.

On March 18, 2019, the paternal grandmother indicated that Jo.S. was now in her care and that Father and Mother had placed the children in her care. A detention warrant was obtained, and the children were detained from the parents and placed temporarily with the paternal grandparents.

On March 21, 2019, section 300 petitions were filed on behalf of the children pursuant to section 300, subdivisions (a) (serious physical harm), (b) (failure to protect), and (j) (abuse of sibling), due to Mother causing serious physical harm to Ja.S., the parents' substance abuse issues, and the parents' domestic violence in the presence of the children.

The detention hearing was held on March 22, 2019. Neither parent was present. However, the paternal grandparents were present. Upon inquiry of the paternal grandparents by the juvenile court regarding Native American ancestry, the paternal grandparents denied any Indian heritage as to Father. As to Mother, the paternal grandmother indicated she believed that she had heard Mother claim Indian ancestry. CFS's counsel indicated that CFS will continue to investigate the ICWA claim. The court made findings and orders to detain the children from their parents and set a jurisdictional/dispositional hearing for April 12, 2019.

CFS recommended that the court find true the allegations in the petitions and that the parents be provided with reunification services.

On April 3, 2019, the social worker spoke with Mother regarding the allegations in the petitions. Mother admitted that she had a substance abuse issue and indicated that she wished to pursue treatment. She also admitted to engaging in domestic violence in the presence of the children, and reported that Father was the aggressor. Mother denied physically abusing Ja.S., and claimed that she did not remember biting the child.

On April 4, 2019, the social worker spoke with Father regarding the allegations in the petitions. Father stated that he had used methamphetamine in the past and last used on March 24, 2019. He reported using heroin and cocaine in the past as well and believed his substance abuse issues were under control. Father indicated that the children had witnessed domestic violence between himself and Mother and that he feels responsible for Mother.

At the scheduled April 12, 2019 jurisdictional/dispositional hearing, Father, Mother, and D.S.'s mother L.S. were present. The juvenile court inquired of the parents regarding their Native American Indian ancestry. Father and L.S. denied any Indian ancestry. Mother indicated that she had Lumbee ancestry from North Carolina, and that a member of her family was an enrolled member. After further inquiry by the court, Mother stated that she had "Sauxfox Sioux" or "Sauxfaux Sioux" ancestry. The court ordered ICWA noticing to be initiated and continued the matter for a further jurisdictional/dispositional hearing.

All of the parents, as well as the paternal grandparents, filled out forms entitled "Family Find and ICWA Inquiry." Mother's form listed the maternal grandmother, J.B.,

under the "Additional Family Contact Information," but provided no contact information. She listed the maternal grandfather, M.J., as the relative that had Native American ancestry through the Lumbee tribe, and provided his contact information. The parents also filled out ICWA-020 forms entitled "Parental Notification of Indian Status." Mother's form initially listed only Lumbee ancestry, but upon further inquiry of the court, it was changed to include "Sauxfox Sioux" ancestry as well.

At the further jurisdictional/dispositional hearing held on May 15, 2019, all parents were present. For that hearing, CFS had prepared a report for the court, indicating ICWA noticing had not been initiated due to limited contact with Mother since the prior hearing, and that additional time was needed to complete the ICWA-030 notice. It was also noted that additional time was needed to interview D.S.'s mother L.S. CFS's counsel requested that Jo.S. and Ja.S.'s matter be continued to allow for ICWA noticing. The court further inquired of Mother regarding Native American ancestry, and Mother reiterated that she had Lumbee, Sioux, and "Sauxfox" ancestry. The court continued the matter as to Ja.S. and Jo.S. to June 20, 2019. As to D.S., his mother L.S. waived reunification services and sought to be excluded from further hearings. The court thereafter continued D.S.'s jurisdictional/dispositional hearing as well to June 20, 2019.

The social worker spoke with Mother on June 5, 2019, regarding her claim of Indian ancestry. Mother reported that she was not a registered member, but her father (Ja.S. and Jo.S.'s maternal grandfather) was a registered member along with her half siblings. Mother provided the social worker with her father's contact information to

gather additional details. The social worker spoke with Mother's father on June 10, 2019, and he was hesitant to provide any personal details. However, he provided the social worker with his date of birth and enrollment number. The social worker also spoke with the paternal grandmother who provided information concerning the paternal grandparents.

At the June 20, 2019 further jurisdictional/dispositional hearing, Father and Mother were present. CFS's counsel requested additional time in order to allow for ICWA noticing as it had not yet been initiated. The court again inquired of Mother regarding her Indian ancestry, and she confirmed that she had Sioux ancestry through the maternal grandmother's mother. There appeared to be confusion on the part of the court and CFS's counsel regarding through which tribes Mother claimed to have ancestry. However, it was clarified that Mother claimed Indian ancestry on her ICWA-020 form with the Lumbee tribe through the maternal grandfather, and Sioux and/or "Sauxfox" Sioux through the maternal grandmother. The matter was then continued to August 8, 2019, for a contested jurisdictional/dispositional hearing.

On August 7, 2019, CFS filed an ICWA Declaration of Due Diligence (ICWA Due Diligence) reflecting that, on July 17, 2019, ICWA-030 notice had been sent to Mother, the Bureau of Indian Affairs (BIA), and 16 of the following tribes: Cheyenne River Sioux Tribe—Lakota, Yankton Sioux Tribe of South Dakota, Spirit Lake Sioux Tribe—Dakota, Prairie Island Indian Community Mdewakanton Dakota Sioux of Minnesota, Sisseton-Wahpeton Oyate, Flandreau Santee Sioux Tribe—Dakota, Crow

Creek River Sioux Tribe—Lakota, Upper Sioux Community, Shakopee Mdewakanton Sioux Community, Lower Brule Sioux Tribe—Lakota, Oglala Sioux Tribe, Standing Rock Sioux Tribe—Lakota, Santee Sioux Nation—Dakota, Assiniboine and Sioux Tribes, Lower Sioux Indian Community of Minnesota, Rosebud Sioux Tribe—Lakota. Certified return receipts, as well as, response letters from some of the tribes was attached to the ICWA Due Diligence. Of these tribes, the Assiniboine and Sioux Tribes, Cheyenne River Sioux Tribe—Lakota, Prairie Island Indian Community, Rosebud Sioux Tribe—Lakota, Shakopee Mdewakanton Sioux Community, Sisseton-Wahpeton Oyate, and Upper Sioux Community responded that the children were not members, nor eligible for enrollment.

The ICWA-030 notice sent to the tribes included: (1) Mother's name, current addresses, date of birth, and her tribal affiliation and membership; (2) the maternal grandmother's name, date of birth, and her tribal information and affiliation; (3) the maternal grandfather's name, current address, and date of birth; (4) the name, current address, and former address as "North Carolina" for one of Mother's grandmothers (the children's maternal great-grandmother); (5) the name of Mother's other grandmother; and (6) the name, current address as "Arkansas," and birth date as "approx 78" for one of Mother's grandfathers (the children's maternal great-grandfather). The notice also included Father's name, date of birth; the names, addresses, and dates of birth for the paternal grandparents; the name and birth date of one of the paternal great-grandmothers;

and the name, partial birth date and partial date of death for one of the paternal great-grandfathers.

The contested jurisdictional/dispositional hearing was held on August 8, 2019. At that time, Mother and Father were present. The court again questioned Mother about her Indian ancestry, and Mother confirmed that she had Indian ancestry through the Lumbee and Sioux tribes. The court noted that there was no federally recognized Lumbee tribe and proceeded with the contested jurisdictional/ dispositional hearing.

Mother filed a waiver of her trial rights and submitted on CFS's recommendations to find the allegations true and receive reunification services. Father was not in agreement with the recommendation to find the allegations true and testified on his behalf. Following testimony from Father and argument from counsel, the juvenile court found true the allegations in the petitions as amended and declared the children dependents of the court. Regarding disposition, the court ordered removal of the children from the parents and ordered CFS to provide reunification services to Father and Mother. As to ICWA, the court found that ICWA may apply as to Ja.S. and Jo.S. and that noticing had been initiated. The court maintained the children in the paternal grandparents' home and set a six-month status review hearing for February 10, 2020.

On September 24, 2019, Father filed a timely notice of appeal from the August 8, 2019 jurisdictional/dispositional orders where "Allegations found true."

III

DISCUSSION

Father contends that the juvenile court improperly proceeded with the combined jurisdictional/dispositional hearing in Ja.S. and Jo.S.'s cases by not ensuring compliance with the inquiry and notice requirements of the ICWA, and therefore the matter should be remanded to the juvenile court to ensure proper inquiry and notice is effectuated. Specifically, he argues (1) the court and CFS failed to properly inquire of all relatives into the children's possible Indian heritage prior to the jurisdictional/dispositional hearing; (2) CFS provided inadequate ICWA notice to the relevant tribes under federal and state law at the time of the jurisdictional/dispositional hearing; and (3) the juvenile court's failure to comply with ICWA constitutes prejudicial error.

When the facts are undisputed, we review independently whether the requirements of ICWA have been satisfied. (*In re J.L.* (2017) 10 Cal.App.5th 913, 918.) However, where the facts are disputed, we review the juvenile court's ICWA findings under the substantial evidence test, which requires us to determine if reasonable, credible evidence of solid value supports the court's order. (*In re Hunter W.* (2011) 200 Cal.App.4th 1454, 1467; *In re H.B.* (2008) 161 Cal.App.4th 115, 119-120 (*H.B.*).) We must uphold the court's orders and findings if any substantial evidence, contradicted or uncontradicted, supports them, and we resolve all conflicts in favor of affirmance. (*In re Alexzander C.* (2017) 18 Cal.App.5th 438, 446.)

ICWA was enacted to curtail "the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement." (*Miss. Band of Choctaw Indians v. Holyfield* (1989) 490 U.S. 30, 32.) Given this focus, ICWA only applies "'when child welfare authorities seek permanent foster care or termination of parental rights [leading to adoption].'" (*In re M.R.* (2017) 7 Cal.App.5th 886, 904 (*M.R.*); see *In re Alexis H.* (2005) 132 Cal.App.4th 11, 14.) "ICWA reflects a congressional determination to protect Indian children and to promote the stability and security of Indian tribes and families by establishing minimum federal standards a state court must follow before removing an Indian child from his or her family. [Citations.]" (*In re Elizabeth M.* (2018) 19 Cal.App.5th 768, 783 (*Elizabeth M.*).)

ICWA provides: "In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention." (25 U.S.C. § 1912(a); see *In re Isaiah W.* (2016) 1 Cal.5th 1, 8 (*Isaiah W.*); *H.B., supra,* 161 Cal.App.4th at p. 120; accord §§ 224.2, subd. (f), 224.3, subd. (a)(3)(A).)

An "'Indian child'" is any unmarried person under 18 who "is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." (25 U.S.C. § 1903(4); accord § 224.1, subd. (b) [adopting ICWA's definition of "'Indian Child'"].) An Indian child's tribe has the

exclusive right to determine whether a child is an Indian child. (*Isaiah W., supra*, 1 Cal.5th at p. 8.)

There are two separate ICWA requirements which are sometimes conflated: the obligation to give notice to a tribe, and the obligation to conduct further inquiry to determine whether notice is necessary. Notice to a tribe is required, under federal and state law, when the court knows or has reason to know the child is an Indian child. (*Elizabeth M., supra*, 19 Cal.App.5th at p. 784.) The court and CFS have a "continuing duty to inquire whether a child [in a section 300 proceeding] is or may be an Indian child." (§ 224.2, subd. (a).) If the court or CFS has "reason to believe" that the child might be an Indian child, it must "make further inquiry" into the child's status. (§ 224.2, subd. (e).) Under section 224.2, subdivision (e), further inquiry includes "[i]nterviewing the . . . extended family members" to gather additional information as well as "[c]ontacting . . . any other person that may reasonably be expected to have information regarding the child's membership, citizenship status, or eligibility." (§ 224.2, subds. (e)(1)-(3).)

"If the notice duty is triggered under ICWA, the notice to a tribe must include a wide range of information about relatives, including grandparents and great-grandparents, to enable the tribe to properly identify the children's Indian ancestry. [Citation.] Any violation of this policy requires the appellate court to vacate the offending order and remand the matter for further proceedings consistent with ICWA requirements. [Citation.]" (*In re J.D.* (2010) 189 Cal.App.4th 118, 124.) Federal regulations require

that ICWA notices include, "[i]f known, the names, birthdates, birthplaces, and Tribal enrollment information" of parents and "other direct lineal ancestors of the child, such as grandparents." (25 C.F.R. § 23.111(d)(3).) The Welfare and Institutions Code provisions applying ICWA contain similar requirements. Although those provisions were amended on January 1, 2019, they at all relevant times required that an ICWA notice contain "[a]ll names known of the Indian child's biological parents, grandparents, and great-grandparents, or Indian custodians, including maiden, married, and former names or aliases, as well as their current and former addresses, birth dates, places of birth and death, tribal enrollment information of other direct lineal ancestors of the child, and any other identifying information, if known." (§ 224.3, subd. (a)(5)(C); see former § 224.2, subd. (a)(5)(C); see also Assem. Com. on Human Services, Analysis of Assem. Bill No. 3176 (2017-2018 Reg. Sess.) Aug. 28, 2018, p. 8 [the bill "'simply seeks to change California law to comply with Federal regulations'"].)

An ICWA notice "enables a tribe to determine whether the child is an Indian child and, if so, whether to intervene in or exercise jurisdiction over the proceeding. No foster care placement or termination of parental rights proceeding may be held until at least 10 days after the tribe receives the required notice." (*Isaiah W.*, *supra,* 1 Cal.5th at p. 5; 25 U.S.C. § 1912(a).) The court is not authorized to determine ICWA does not apply until (1) "proper and adequate" ICWA notice has been given, and (2) neither a tribe nor the BIA has provided a determinative response to the notice within 60 days of receiving the notice. (*Isaiah W.*, at p. 11.)

Hence, CFS must send ICWA notices that include information listed in the statute to any tribe in which the child may be a member or eligible for membership, based on the parents' claims. (§ 224.3, subd. (a)(3) & (5).) The juvenile court must then "[t]reat the child as an Indian child" until it has determined ICWA does not apply. (25 C.F.R. § 23.107(b)(2); see *In re S.B.* (2005) 130 Cal.App.4th 1148, 1157 [federal regulations implementing ICWA are binding on state courts].) "[S]wift and early resolution of ICWA notice issues is ideal." (*Isaiah W.*, *supra*, 1 Cal.5th at p. 12.)

CFS argues Father's appeal is premature and his ICWA issues are not ripe for review because the juvenile court found that ICWA may apply to Ja.S. and Jo.S., and "any perceived deficiencies with ICWA notice can be resolved through the normal course of the juvenile dependency proceeding." We agree with CFS.

Ripeness refers to the requirement that a case present a current controversy. (*City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 59.) The ripeness requirement ensures that courts focus on resolving specific legal disputes, rather than abstract differences of legal opinion, and prevents courts from issuing purely advisory opinions. (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 170-172.)

In *M.R.*, *supra*, 7 Cal.App.5th 886, the juvenile court found that the ICWA noticing had been initiated and ICWA may apply to the children at the time of the dispositional hearing. (*Id.* at p. 904.) In their appeal from the dispositional findings and orders, both parents challenged the adequacy of the efforts made to comply with the ICWA notice requirements. (*Id.* at p. 903.) We determined that the dispositional ICWA

finding was not a final ruling and concluded that the parents' claim was "simply premature" and declined their invitation to review the adequacy of the noticing under ICWA. (*Id*. at p. 904.) We noted that the children's juvenile court case was still ongoing and acknowledge that the issue could be addressed in the future. (*Id*. at p. 904, fn. 9.)

In this case, CFS initiated the ICWA noticing, mailed out and received return receipts. The court found that ICWA may apply to Ja.S. and Jo.S. at the dispositional hearing. Ja.S. and Jo.S. are still dependents of the court and Father is working on reunifying with Ja.S. and Jo.S. The court, therefore, has not made a final judgment on this issue. Accordingly, the issue is premature. And because there is no final ICWA ruling, the issue is not ripe for review.

Nonetheless, we remind CFS and the court to ensure compliance with state and federal ICWA statutes. In that respect, based on the record before us, it appears further inquiry is required of Mother and her relatives, and additional ICWA-030 notices be sent to the tribes with adequate and proper information in the notice to include: To the extent known, among other things: (1) the Indian child's name, birth date, and birthplace; (2) the name of the Indian tribe in which the child is a member or may be eligible for membership; and (3) "[a]ll names known of the Indian child's biological parents, grandparents, and great-grandparents . . . including maiden, married and former names or aliases, as well as their current and former addresses, birth dates, places of birth and death, *tribal enrollment information* of other direct lineal ancestors of the child [*including*

tribal enrollment numbers], and any other identifying information, if known." (§ 224.3, subd. (a)(5)(C), italics added; see 25 C.F.R. § 23.111(d)(3).)

IV

DISPOSITION

The juvenile court's jurisdictional findings and dispositional orders are affirmed.

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CODRINGTON
J.

We concur:

MILLER
Acting P. J.

FIELDS
J.